

tory (2002), chapter 7 (pp. 274–289); and Tuomas Kuokkanen, “Putting Gentle Pressure on Parties: Recent Trends in the Practice of the Implementation Committee of the Convention on Long-range Transboundary Air Pollution” in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (2003), pp. 315–326.

7 See paragraph 3 c of the Structure and Functions of the Implementation Committee and Procedures for Review of Compliance (Annex to Decision 1997/2, as amended; ECE/EB.AIR/75, Annex V). It should be noted, however, that in the case of the LRTBAP Convention the option has so far never been taken up.

8 See paragraph 5 of the draft terms of reference of the multilateral consultative process of the Convention (Annex II to the report of the *Ad Hoc* Group on Article 13 (FCCC/AG13/1998/L.1, dated 11 June 1998).

9 See paragraph 3 of the non-compliance procedure adopted at the Tenth Meet-

ing of the Parties to the Montreal Protocol (decision IV/5 and Annex IV (1992), as modified by Decision X/10 (1988)).

10 See paragraph 1 of section VI of the Procedures and Mechanisms relating to Compliance under the Kyoto Protocol (Annex to Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3).

11 See Decision III/2, Review of Compliance, ECE/MP.EIA/6 (13 September 2004).

12 See paragraphs 18–24 of the Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Annex to Decision 1/7 (2002)).

13 See Veit Koester, “The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence”, pp. 83–96, below.

The Compliance Committee of the Aarhus Convention

– An Overview of Procedures and Jurisprudence –

by Veit Koester*

1. Introduction

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)¹ entered into force on 30 October 2001. The Convention has (as of July 2006) 39 Parties, among them most of the 25 EC countries as well as the EC. Remaining parties are Central and East European countries.

The Protocol to the Convention on Pollutant Release and Transfer Registers (2003 PRTR Protocol)² was adopted in May 2003, but as of July 2006 had not entered into force. Equally, an amendment to the Convention on Genetically Modified Organisms (GMOs),³ adopted at the Second Meeting of the Parties (MOP) in Almaty, Kazakhstan, in May 2005, has not yet entered into force.

Articles 1, 2 and 3 of the Aarhus Convention contain provisions on objective, definitions and general obligations, while articles 4–9 regulate in a detailed manner the three pillars of the Convention: (1) access to environmental information⁴ and collection and dissemination of environmental information;⁵ (2) public participation in decisions on specific activities,⁶ public participation concerning plans, programmes and policies relating to the environment,⁷ and public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments⁸; and (3) access to justice.⁹

The remaining articles, Articles 10–22, contain provisions on, *inter alia*, convention organs,¹⁰ amendments,¹¹ settlement of disputes¹² and final clauses.¹³

The Convention does not deal with the protection of the environment *per se* but with the procedural rights of

civil society in respect of the environment by imposition of obligations on states.

2. The Compliance Mechanism

At the first MOP in October 2002 the Meeting adopted a decision on review of compliance (Decision I/7).¹⁴ The compliance mechanism (CM), based solely on the article on compliance review, establishes a Compliance Committee (CC), constitutes the Committee and the MOP as the main bodies for review of compliance, and sets out in an annex the structure and function of the Committee as well as the procedures for reviewing compliance with the Convention.

The nature of the Convention and the provision of the Convention on review of compliance¹⁵ include a number of features which, compared to the compliance mechanisms of (other) MEAs, are unique.¹⁶ These features, one of the most prominent of which being the composition of the Compliance Committee,¹⁷ have to a large extent influenced the procedures of the CC. The nature of the Convention and triggering of the CM by complaints of members of the public (communications) have, of course, also influenced the substantive findings of the CC.

The CC held its first meeting in March 2003 and became operational with regard to communications in October 2003.¹⁸ The CC has (as of November 2006) held thirteen meetings (most of them being three-day meetings), *i.e.*, on average four meetings annually, and has, in addition to four cases which were found inadmissible by the CC, concluded nine cases (the average time from the date of a submission of a complaint until the CC's conclusion of the file being approximately 389 days; see Table 1). Therefore, it seems feasible and appropriate to present the outcome of the work of the CC during its first three to four years of existence in the form of a provisional status of decisions of the CC.

Section 3 of this article presents the general procedures of the CC focusing on features which probably distinguish the procedures from, or are more elaborate than, those of most other CMs. Section 4 highlights some procedural

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Table 1: Dates of submissions to the compliance committee and dates of findings and recommendations of the compliance committee.¹

	Communication received	Findings and recommendations adopted	From submission to conclusion (number of days) ²
1. ACCC/C/2004/02 Green Salvation (Kazakhstan) v/ Kazakhstan ³	7/2 2004	18/2 2005	371
2. ACCC/C/2004/02 Green Salvation (Kazakhstan) v/ Kazakhstan	12/3 2004	18/2 2005	336
3. ACCC/C/2004/03 and ACCC/S/2004/01 Ecopravo-Lviv (Ukraine) and Romania v/ Ukraine	5/5 2004 (Romanian Submission: 7/6 2004)	18/2 2005	283
4. ACCC/C/2004/04 Clean Air Action Group (Hungary) v/ Hungary ⁴	7/5 2004	18/2 2005	281
5. ACCC/C/2004/05 Biotica (Moldovia) v/ Turkmenistan	10/5 2004	18/2 2005	278
6. ACCC/C/2004/06 Ms. Gatina, Mr. Gatina and Ms. Konyushkova v/ Kazakhstan	3/9 2004	31/3 2006	568
7. ACCC/C/2004/08 International Armenia, the Sakharov Armenian Human Rights Protection Centre and the Armenian Botanical Society v/ Armenia	20/9 2004	31/3 2006	551
8. ACCC/C/2005/11 Bond Beter Leefmilieu Vlaanderen VZW (Belgium) v/ Belgium	3/1 2005	16/6 2006	523
9. ACCC/C/2005/13 Clean Air Action Group (Hungary) v/ Hungary ⁵	18/5 2005	31/3 2006	313
Average time in days:			389

¹ The table does not contain submissions which were found to be inadmissible by the Compliance Committee.

² Calculated on the basis of one year = 360 days.

³ The "v/" only indicates the communicant as opposed to the Party alleged to be non-compliant.

⁴ See note 48.

⁵ See notes 22 and 59.

decisions relating to deliberations of the CC, and section 5 focuses on some substantive findings of the CC. Section 6 contains some concluding remarks.

3. Procedures of the Compliance Committee

3.1 General comments

Decision I/7 contains some procedural provisions, the provisions on handling communications from members of the public being more elaborate than those on handling submissions (from Parties *vis-à-vis* themselves or other Parties) or referrals by the Secretariat.¹⁹ Decision I/7 also contains provisions on information gathering, confidentiality, entitlement to participate, committee reports and considerations by the CC.²⁰ The CC has decided as a general rule that even if the CC is not a subsidiary body to the MOP, the rules of procedure of the MOP can be applied *mutatis mutandis*.²¹ In practice, however, this decision has never played any role, *inter alia* because the CC has been able to make almost all decisions, procedural as well as substantive, by consensus.

The above provisions provided a kind of procedural skeleton not sufficient to serve as a suitable procedural framework for the work of the CC. Procedures developed under other mechanisms, *e.g.*, the former Human Rights Committee, provided little guidance taking into account the unique nature of the Aarhus Convention CM. So, the CC in many ways had to start from scratch in developing its procedures and other working methods. In addition it has, as necessary, expanded some of the procedural rules in Decision I/7 by interpretation. Main procedures developed by the CC, including interpretation of existing rules, have been recorded in its meeting reports²² and were summarised in the report of the CC to MOP-2.²³ A compilation of procedures has been elaborated and is regularly updated. The compilation includes the composition, functions, powers of the CC; issues related to the *modus operandi* of the CC, such as general principles, procedures for handling submissions, referrals and communications, information gathering and on-the-spot appraisals; the relationship between the CC and NGOs; and an information paper on communications from the public (the compilation is referred to below as *Modus Operandi*).²⁴

The way in which the CC had been working and the procedures that it had developed, as reflected in the reports of its meetings, were welcomed by MOP-2,²⁵ including the observation that the CM is not a redress mechanism. However, procedures are still being developed, and previously adopted procedures are sometimes modified in light of experience gained.

The following review of the *Modus Operandi* of the CC does not pretend to be exhaustive. Rather, it focuses on some main issues emphasising what may be characterised as unique features.²⁶ Thus, the review does not reflect all the procedural provisions of Decision I/7, *e.g.*, the procedural safeguards, most of which are, compared to other CMs, relatively traditional.²⁷

3.2 Openness of Compliance Committee meetings.

Generally speaking, all meetings of the CC are open to anyone wishing to attend the meeting,²⁸ while the re-

quirement of Decision I/7²⁹ only provides for participation of "concerned parties" (communicants and Parties in respect of which submissions, referrals or communications are made or which make submissions). Participation by concerned parties entails, by decision of the CC, the right to comment, to be heard, and to have comments taken into account by the CC. Others, attending meetings as observers, may be given the floor for information or comments. Such opportunities are provided upon request. The openness of meetings also includes deliberations of the CC on its preliminary determination on the admissibility of a communication and which points to raise with the parties concerned. Questions to be raised may, however, be decided by electronic decision-making and subsequently recorded in the meeting report. Furthermore, also meetings where the CC is entering into formal discussion of the merits of a communication with the parties concerned, usually making at the same time a final determination on admissibility, are open to the public. Under Decision I/7 parties concerned (and consequently also observers) are not entitled "to take part in the preparation and adoption of any findings, any measures or any recommendation of the Compliance Committee".³⁰ Communications (and submissions) are discussed formally with parties concerned, following a specific procedure which also provides an opportunity for observers to comment before decisions are made. Since such discussions are open, "preparation" of findings has been interpreted rather narrowly by the CC. The discussion with parties concerned is not considered by the CC as a "hearing", which the CC may hold, under Decision I/7,³¹ but has in practice made hearings more or less superfluous. In any event, the CC has never held a hearing.

3.3. Transparency in respect of documents

Meeting documents are made available on the website of the CC. This does not include discussion papers prepared by the Secretariat, although such papers are available upon request. Summary information enabling the public to track the proceedings of communications (and, if relevant, submissions and referrals), including communications that are determined to be admissible, and significant related documentation is published on the website of the CC when they have been sent to the Party concerned. At the same time a data sheet containing information on the communication and its content is published on the website. It goes without saying that decisions of the CC ("findings and recommendations") in specific cases are made available to the public (through their publication as addenda to reports on meetings where decisions were made). However, at its tenth meeting the CC decided that draft findings and recommendations would also be available upon request once they had been transmitted to the parties concerned. Similarly, any comments provided by the parties concerned are publicly available upon request, unless the body submitting the comments requests that they remain embargoed up to the end of the commenting period, in which case they would not be available during that period. At the end of the commenting period both the drafts and the comments enter the public domain.³² ➤

Contributions, information, positions and requests from NGOs and members of the public are officially registered with a view of spreading the information and giving everyone a chance to participate with the same level of information.

3.4 Conflicts of interest, etc.

The unique nature of the CC has entailed a number of procedural decisions, the main decision being that if a member of the CC considers himself to have a possible conflict of interest, he would be expected to bring the issue to the attention of the CC. Being a citizen of a state whose compliance is to be discussed does not in itself constitute a conflict of interest. Conflict of interest has been declared five times by members. Such member is treated as an observer and does not participate (*i.e.*, is not present) in the preparation or adoption of findings, measures or recommendations with respect to the case in question.

Members of the CC are not excluded from but should avoid providing advice in response to requests from NGOs, which could, in some cases, lead to a conflict of interest. Equally, members may deal with requests for information about specific cases where such information is already in the public domain. However, channelling such requests to the Secretariat is advisable.

Members may accept invitations to present the CM at appropriate events but should not represent NGOs or be present in any other capacity than as members of the CC in any official meeting related to the Aarhus Convention.

Unless specifically mandated by the CC to collect information, meetings of members of the CC (and of the Secretariat) with the parties concerned do not constitute information-gathering under the provisions of Decision I/7. Information should be formally addressed to the Committee, through the Secretariat.

3.5 Curatorship

The CC has developed a practice according to which a member of the CC may agree to provide assistance in respect of a specific communication. The main reason for this system is that the workload related to communications is considerable. It is usually difficult to assess the information provided and to evaluate the legal background. Curatorship includes presentation of the communication and recommendations to the CC with regard to the preliminary determination on admissibility and questions to be raised with the parties concerned; a leading role at the formal discussion of the merits of the communication with the parties concerned, and elaboration of the first draft findings and recommendations (an outline of which should normally be available (only) to members of the CC before the formal discussion), *inter alia* in order to provide a better understanding of the case and to help identify further information needed. The curator continues to serve as such after the formal discussion of the file has taken place, if the CC does not manage to conclude the case at that meeting, but works in close collaboration with the Chair and the Secretariat, until a (new) draft can be presented to the CC.

3.6 Information gathering and relationship with NGOs

In respect of information gathering, suffice to state that the CC has by virtue of Decision I/7 an almost unlimited power to gather information and to consider information submitted to the CC. This has entailed a number of decisions related to *inter alia* various types of information, sources of information, motivations of information providers etc., due to the fact that information to be taken into account should be relevant, reliable and available to everyone.³³

The NGO community plays a significant and special role in the context of the Aarhus Convention CM, partly reflected in *Modus Operandi*.³⁴ This role belongs to the broader issue of the role of NGOs with regard to MEAs in general and more specifically with respect to compliance/enforcement.³⁵ Due to the role of NGOs in the context of the Aarhus Convention CM, including the entitlement of NGOs to attend meetings of the CC, there has been no need to develop *amicus curiae* arrangements.

3.7 Interpretative decisions relating to the provisions of Decision I/7

Procedures with respect to submissions by Parties concerning other Parties under Decision I/7 are not detailed. In addition they are to some extent not logical. For example, understood literally, the CC has to be informed about a party-to-party submission only after the expiry of the period which the Party whose compliance is at issue has at its disposal for responding to the submission (*i.e.*, three to six months after the Party has been informed about the submission). The CC has, therefore, developed more extensive procedures in that regard which are included in *Modus Operandi*.³⁶

In view of the importance of protecting the interests of third parties, the CC has constructed a provision of Decision I/7 to apply to information which the communicant has requested be kept confidential, not only out of the communicant's concern "that he or she might be penalised, persecuted, or harassed", but also of his or her concern that another person or persons might be so treated.³⁷

Decision I/7 provides a list of non-compliance response measures available to the MOP upon consideration of a report and any recommendations of the CC. The CC has decided that the relevant provisions should not be interpreted as requiring a specific sequence in which these measures could be recommended or undertaken.³⁸

If the CC finds that the Party in question is not in compliance it should under Decision I/7 agree upon possible "measures" or "recommendations". The CC has understood "measures" to refer to measures which the CC is entitled to take in accordance with the relevant provisions of Decision I/7 pending consideration by the MOP (and which may include recommendations to the Party concerned). "Recommendations" are understood to refer to recommendations to the MOP (and which may include recommendations to take one or more of the measures listed³⁹).

Other interpretative decisions relate to the admissibility criteria⁴⁰ which have been interpreted in a rather broad

manner⁴¹ and the requirement that the CC should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.⁴² According to the interpretation of the CC this requirement does not mean that failure to exhaust or sufficiently explore the possibilities for resolving the issue through national administrative or judicial review procedures renders a communication inadmissible.

The powers of the CC to act during the intersessional periods between MOPs are rather limited (Parties have opted for a three-year interval between MOPs). In particular, some of the measures available to the CC may only be taken with the “agreement” of the Party concerned, leading to a delay in addressing non-compliance of possibly years.⁴³ The CC has so far been able to overcome this problem by “mildly” persuading Parties whose compliance is at issue to accept recommendations, arguing that non-acceptance might force the CC to submit its findings and recommendations for a final decision by the MOP. Thus, by accepting the recommendations of the CC, and provided that some progress has been made in the meantime, the relevant Party might only be included for reference in the report of the CC to the MOP.⁴⁴

4. Procedures related to the preparation and adoption of findings and recommendations

4.1 Some general remarks

In addition to the general procedures the CC has developed some procedures or made concrete procedural decisions which are closely related to its deliberations when preparing and adopting findings and recommendations in specific cases. Some of these are included in the *Modus Operandi* while others are reflected only in meeting reports or included in findings and recommendations in individual files.⁴⁵ It might be assumed that concrete procedural decisions will be applied by the CC in other cases if circumstances are alike.

The overview below of such procedures or procedural decisions does not pretend to be exhaustive. Furthermore, some decisions referred to may belong to the interface between procedural and substantive decisions. Finally, it should be kept in mind that the CM is designed to improve compliance and is not a redress procedure for violations of individual rights. This has influenced some of the procedural decisions.

4.2 The framework for the deliberations of the CC

As a rule, any substantial new information should be presented to the CC by either party at least two weeks in advance of the formal meeting with the parties concerned preceding the deliberations of the CC in closed session. However, the CC is not constrained to take account of any such information submitted after the deadline.

The CC is not restricted to the consideration of legal or factual arguments presented by the parties concerned and considers itself free to draw conclusions that go beyond those presented to it (see Table 2). The CC also con-

siders itself free not to address all the arguments and assertions presented in communications (submissions or referrals) in order, *inter alia*, to focus upon what it considers most relevant. If the CC does not explicitly refute an assertion or argument, it does not imply an endorsement, and lack of explicit endorsement by the CC of an argument does not imply that it has rejected it.

4.3 The mandate of the CC

The CC has in some cases stated that it considers itself to be beyond the scope of its mandate to examine a claim by a communicant that specific regulations were breached because such regulations were not relevant in the context of the Aarhus Convention.⁴⁶ On the other hand, the CC has also stated that it “does not exclude the possibility when determining issues of non-compliance to take into consideration general rules and principles of international law, including international and human rights law”.⁴⁷

Having regard to the non-confrontational, non-judicial and consultative nature of the CM, the CC has considered that the fact of a matter being under consideration by another international review procedure would not in itself prevent the CC from dealing with the matter.⁴⁸

With respect to national decision-making processes which began before the Convention entered into force, or started before the Convention entered into force for a Party whose compliance is at issue or during the “grace period” of one year (see endnote 18 in section 2 above), the CC has decided that it is not precluded from considering communications submitted after the “grace period” if the significant events occurred after the entry into force of the Convention in that state Party.⁴⁹

In a case dealing with access to justice and the issue of standing, the CC found, that “[s]ince all the court decisions submitted by the communicant refer to cases initiated before the entry into force of the Convention for ..., they cannot be used to show that the practice has not been altered by the very entry into force of the Convention”.⁵⁰ So, in this regard, the initiation of a court case was considered as the most significant event.⁵¹

The mandate of the CC does not include a possibility of revisiting an earlier decision of the CC which has been submitted to and endorsed by the MOP.⁵²

In respect of the mandate of the CC, a specific case is noteworthy. The CC had in a previous case concluded that an act did not constitute non-compliance with the Convention. Due to an amendment of the act the communicant submitted a new communication alleging that the act was (now) in non-compliance with the Convention. After having submitted the communication the communicant requested an extension of the fact-finding period of consideration of the communication and to refrain from preparing findings and recommendations until practical experience with the application of the amendment had accumulated. The Party concerned indicated its opposition to such a deferral. The CC did not accept the communicant’s argument for deferring discussion, as it considered that this could set a bad precedent. In this connection the CC also decided that in the event that a communicant withdrew its communication, the CC would have the option

Table 2: Provisions of the convention alleged or found not to have been complied with.¹

Article	1				2				3				4				5				6				7				8				9			
	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
Paragraph																																				
C/2004/01	A																																			
Kaz.	F																																			
C/2004/02	A																																			
Kaz.	F																																			
S/2004/01 and A																																				
C/2004/03 Ukr.F																																				
C/2004/04	A																																			
Hungary	F																																			
C/2004/05	A																																			
Turkn.	F																																			
C/2004/06	A																																			
Kaz.	F																																			
C/2004/08	A																																			
Arm.	F																																			
C/2005/11	A																																			
Belg.	F																																			
C/2005/13	A																																			
Hungary	F																																			

Alleged by the communicator or the submitting Party not to have been complied with
 Found by the Committee not to have been complied with
 Potential non-compliance identified by the Committee

¹ Adapted from Annex 1 of Report of the Compliance Committee to MOP 2, doc. ECE/MP.PP/2005/13, 11 March 2005, C/2004/06, C/2004/08, C/2005/11 and C/2005/13 added. C = communication, S = submission. For further details, see section 5 of the paper, including note 22.

either to proceed with consideration of the communication, or not to do so, and that the choice would depend upon the extent to which it considered that the compliance issues raised were important. The opinion of the Party would not be decisive, since communications serve as a trigger for a review of compliance. Furthermore, the role of the CC is not to provide a redress procedure,⁵³ and the CC has a broad mandate to look into compliance issues on its own initiative, including under Decision I/7.⁵⁴

4.4 Some other (procedural) decisions

The CC has not made any decision as a matter of principle on burden of proof but has in some cases indirectly referred to this issue. The CC has in one case referred to the fact that the communicant “did not substantiate [a] claim with specific arguments” and to “inconclusive evidence that the public lacked access to justice”, in another case “to sufficient evidence that the... authorities were well aware of ...”, and in yet a further case to “no sufficient evidence”. All findings address evidence presented by the communicant, demonstrating that the communicant initially has to substantiate allegations. The form that the CC “is not convinced” about failure to comply is also applied.

However, the CC has also applied a reversed burden of proof approach where this seemed appropriate, taking into account the specific circumstances. Thus, the communicant in another case claimed that she was not properly notified about a court hearing. The CC concluded that the Party had to present evidence that notification had been made (which the Party, however, did not do). In another case the CC found that it was up to the Party concerned to present evidence that the decision-making on the activity at issue was still at a stage where all options remained open. Since the Party concerned failed to present this evidence, the CC concluded that the decision-making did not comply with the requirements of Article 6 (1) (b) and in conjunction with Articles 6 (2)–(9).⁵⁵ So, generally speaking, practice of the CC in respect of burden of proof has followed expected patterns.

Two further specific procedural decisions should be mentioned. In the case that represented a continuation of a previous case, referred to in section 4.3 above, the CC, after formal discussion of the case with the parties concerned and after having deliberated the case in closed session, presented its conclusions (no non-compliance as in the previous case) in an open session with the parties concerned present. The chairperson proposed that, in the interest of making the most effective use of the CC’s time and given the similarities of its findings with respect to the findings in the previous case,⁵⁶ the review of the communication be limited to the reflection of the findings in the report of the meeting instead of developing a formal paper with evaluations and findings. The parties concerned agreed with this approach, including the recommendation of the CC to the Party concerned to keep the matter under review, because the consequences of the changes in legislation for compliance with the Convention might depend on their practical application. The way of dealing with this case has no explicit basis in Decision I/7, and the

manner in which the case was resolved could be considered as a result of the CC acting as mediator. This seems to be fully in line with the nature of the CM.⁵⁷

In another case where the communicant alleged non-compliance with some provisions of Article 6 in the decision-making on EIA, in particular at the scoping stage of the procedure, the CC decided, after formal discussion with the parties concerned, not to proceed with the development of findings and recommendations until the environmental agreement procedure had been completed. The CC, however, upheld its preliminary determination on admissibility.⁵⁸ The decision probably reflects some kind of reluctance of the CC to interfere with a process still underway.

5. Jurisprudence of the Compliance Committee

5.1 Introductory remarks

Through its findings and recommendations in eight cases⁵⁹ the CC has addressed several interpretative issues. Findings and recommendations with regard to four of the five cases submitted to MOP 2 were endorsed by MOP 2⁶⁰ while the conclusions in the fifth case were taken note of by the MOP and, in particular, that the Party concerned was in compliance with its obligations under the Convention.⁶¹ Although the interpretations of various provisions of the Convention provided by the CC via its findings in these cases have been “taken over” by the MOP, they are considered below as belonging to the jurisprudence of the CC.

As part of its findings and recommendations regarding the five cases the CC also identified some *lacunae* in the provisions of the Convention, which could not be resolved by interpretation.

Article 6 on public participation in decisions on specific activities contains *inter alia* provisions for notification of the public concerned which may include the public in another country, *e.g.*, if the activity is close to the border, but there are no provisions or guidance in or under Article 6 on how to involve the public in another country.⁶² The CC, therefore, recommended to MOP-2 that the Working Group of the Parties should be mandated to develop guidance on implementing the provisions with respect to decision-making on projects in border areas that affect the public in other countries but do not require transboundary EIA under the Espoo Convention, which includes procedures for public participation⁶³.

Article 6 does not contain a definition of the environment in the context of “environmental decision-making procedure”.⁶⁴ Hence, the CC recommended to MOP-2 that the Working Group of the Parties should be mandated to develop guidance on the scope of the permitting processes set out in Article 6, *i.e.*, the extent to which such processes should be environmental in character and what “environmental” means in this context.⁶⁵

None of the recommendations were, however, addressed by MOP-2, the reasons for this being unknown to the author of this article.

Included in the overview below are also some interpretations provided by the CC in findings and recommen-

dations in three further cases concluded by the CC after MOP-2.⁶⁶ Provided that sufficient progress has been achieved before MOP-3 regarding the recommendations of the CC in these cases, the report of the CC to MOP-3 is probably going to concentrate on progress made. Hence, findings and recommendations would not be submitted formally for endorsement by the MOP (see section 3.7 above).

The survey below of jurisprudence of the CC is not exhaustive. The average time of the CC for reaching its findings and recommendations in the cases dealt with in the survey was approximately one year after the submission (see Table 1).

5.2 “The public”, “the public concerned” and non-discrimination

Articles 2 (4) and 2 (5) of the Convention provide definitions of “the public” and “the public concerned” which include non-governmental organisations promoting environmental protection and meeting any requirements under national law. Article 3 (9) prohibits discrimination on the grounds of citizenship, nationality or domicile and, in the case of a legal person, discrimination as to where it has its registered seat or an effective centre of its activities. The CC has addressed the interpretation of these provisions in two cases.

Findings of the CC regarding these provisions include that foreign or international NGOs that have expressed an interest in or concern about a procedure under Article 6 on public participation in decisions on specific activities would generally fall under definitions of “the public” and “the public concerned” as set out in Articles 2 (4) and 2 (5).⁶⁷ In the other case, the CC found that “the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them” and, therefore, was not in compliance with Article 3 (9). Furthermore, the CC found that while the Convention does not exclude the possibility for Parties to regulate or to monitor to a certain degree activities of NGOs within their jurisdiction such regulation “should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions”, and “it should not prevent members of the public from more effectively exercising their rights under the Convention by forming or participating in NGOs”.⁶⁸ With the exception of the last findings these interpretations, however, in essence hardly amount to more than a mere application of the wording of the relevant provisions.

5.3 A “clear, transparent and consistent framework”

According to Article 3 (1) Parties shall take the necessary legislative, regulatory and other measures “to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention”.

The CC has in three cases found that this provision was not complied with. In this respect the three cases also constitute examples of a practical implementation of the procedural rule of the CC not being restricted to the consideration of legal (and factual) arguments presented by

the parties concerned, since the communicants in none of the cases alleged non-compliance with Article 3 (1) (see section 4.2 above). In another case the communicant did in fact claim that Article 3 (1) was not complied with. However, the CC only addressed the requirements of Article 3 (1) in general terms, but not the specific allegation, thus demonstrating that the CC considers itself free not to address all assertions presented in a communication (submission or referral) (see section 4.2 above).⁶⁹

Findings with respect to non-compliance with Article 3 (1) relate to:⁷⁰

- no proper transposition into national legislation of Article 9 (1) on access to justice in respect of request for information under Article 4;
- lengthy appeal processes primarily due to different interpretations of domestic legal provisions by various judicial instances;
- lack of clarity or detail in domestic legislative provisions, in particular with regard to time frames and procedures for commenting under Article 6 and possession of public authorities of information relevant to their functions; and
- enacting provisions not being in compliance with Article 3 (9) on non-discrimination (see section 5.2 above) and Article 3 (4) on appropriate recognition of associations, organisations or groups promoting environmental protection.

The issue of non-compliance with Article 3 (1) was raised by the CC as a general compliance issue in its report to MOP-2. The report refers to the fact that some Parties, in particular those with legal systems that allow for ratification of a treaty without prior transposition into the domestic system relying on the direct applicability of the Convention, sometimes fail to adopt or adopt only parts of their legislation, while the Convention, although a part of domestic legislation, remains a framework. Such framework legislation fails to provide clear requirements, standards and guidance for those who implement and enforce it and for civil society.⁷¹ All cases referred to concern East European countries which are the USSR’s successor states, and which apply a monistic principle with regard to the legal effect of treaties they have ratified.⁷²

5.4 Public participation in decision-making

Articles 6, 7 and 8 of the Convention deal with public participation relating to specific activities, plans/programmes/policies and preparation of executive regulations, respectively. While non-compliance with various provisions of Article 6 has been at issue in a number of cases, compliance with Articles 7 and 8 has only been considered in one case (see Table 2).

Findings of the CC in respect of Article 6 include *inter alia*:

- It is a moot point whether the fact that an EIA process is limited to the consideration of waste and pollution issues constitutes non-compliance with Article 6, but restricting the scope of the process to just some types of environmental effects could seriously undermine the efficacy of that article;

- Article 6 (6) is aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and, therefore, more effective, and it is “certainly not limited to publication of an environmental impact statement”;
- Article 6 does not in itself clearly specify the exact place from which the EIA should be subject to public participation, but Article 6 (4) requires early participation when all options are open and participation can be most effective. Ninety days provided for by the act at issue should, under normal circumstances, be sufficient to provide for public involvement;
- The fact that some activities were subject to an environmental assessment procedure, including public participation, brought them within scope of Annex I, para. 20 and, therefore, some decisions could be seen as subject to Article 6 (1) (b); the fact that the decrees in question were not published but later could be accessed through an electronic database did not satisfy the requirements of Article 6 (9) to promptly inform the public of the decision.⁷³

5.5 Access to justice

Articles 9 (1) and (2) contain provisions on access to justice with regard to requests for information under Article 4 and the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6, respectively. Article 9 (3) concerns access to justice to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. Finally, under Article 9 (4) procedures referred to in Articles 9 (1) to (3) shall provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive. These provisions have been addressed in a number of communications, and the CC has concluded non-compliance with various provisions of Article 9 in three cases as well as potential non-compliance in one case (see Table 2).

Findings of the CC with respect to Article 9 include the following points:

- taking a final siting decision by a ministerial decree limits the possibilities of appealing against these decisions under Article 9 (2). However, the CC “does not believe that such a system necessarily conflicts with Article 9 (2), as long as there are appeal possibilities with regard to the environmental part of the decision”;
- a procedure “which allows for a court hearing to commence without proper notification of the parties involved ..., cannot be considered a fair procedure in the meaning of Article 9 (4)”;
- “failure to communicate court decisions to the parties constitutes a lack of fairness and timeliness in the procedure”; a “general failure by public authorities to implement and/or enforce environmental law would constitute an omission in the meaning of Article 9 (3)”;
- judicial independence, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process, but such independence can only operate within the boundaries of law. The three branches of power each need to make an effort to facilitate compliance with an international agreement. Judicial bodies “might have to carefully analyse [their] standards and tests in the context of the Party’s international obligations and apply them accordingly”;
- the CC “acknowledges that national legislation, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what are known as ouster clauses in laws”, but “to regulate matters subject to Articles 6 and 7 exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions.” Where the legislation gives the executive a choice, “public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law”;
- in a case concerning standing before the judicature where the CC was “not convinced” that the Party failed to comply with the Convention (section 4.4 above), but nevertheless concluded that if the jurisprudence of the court (Council of State) was not altered the Party would fail to comply with Article 9 (2) to (4), the CC made a number of observations, including:
 - when determining how to categorise a decision under the Convention its label in the domestic law of the Party is not decisive. Rather, “whether the decision should be challengeable under Article 9 (2) or (3) is determined by the legal functions and effects of the decision ...”;
 - although what constitutes a sufficient interest and impairment of a right under Article 9 (2) shall be determined in accordance with national law, it must be decided “with the objective of giving the public wide access to justice” within the scope of the Convention;
 - when assessing “the criteria for access to justice for environmental organisations” under Article 9 (3) the provision should be read in conjunction with Articles 1 to 3 of the Convention, and in light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced”;
 - Parties “may not take the clause in Article 9 (3) relating to standing⁷⁴ to the effect that members of the public “meet the criteria, if any, laid down in ... national law as an excuse for introducing or maintaining so strict criteria that they bar all or almost all environmental organisations from challenging acts or omissions that contravene national law”;
 - access to justice should be the presumption, not the exception, and the application of some sort of criteria should not bar effective remedies for members of the public;
 - if standing is not granted to federations of environmental organisations it is possible that, to the extent that member organisations of the federation

have standing under Article 9 (3), this may suffice for complying with the provisions;

- should “legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyse its standards in the context of a Party’s international obligations, and apply them accordingly”.⁷⁵

Some of the findings are probably to some extent self-evident, while others may have more far-reaching interpretations. However, the full implications of the above citations can, of course, only be assessed if they are examined in the context of which they appear. This observation applies equally to other quotations of the findings of the CC in this article.

The relatively high number of cases related to Article 9 probably reflects that some of the provisions of Article 9 are rather difficult to implement *inter alia* due to a combination of the independency of courts and that standing in a number of States is decided mainly in accordance with traditions, including jurisprudence. The fact that it has not yet been possible to conclude the proposed directive on access to environmental matters demonstrates the difficulties involved.⁷⁶ Not surprisingly, some of the provisions of Article 9 are results of long and difficult negotiations.

Cases related to Article 9 concluded before MOP-2 entailed a general recommendation of the CC to MOP-2 to consider measures to raise awareness among the judiciary. This recommendation, however, was only taken note of by the MOP.⁷⁷

5.6 Some findings of a general nature

One of the cases concluded by the CC relates to an act which established a special decision-making procedure for the construction of expressways, thereby reducing existing domestic rights of the public to participate in decision-making procedures. The Convention contains, however, a provision demonstrating that the negotiation process considered the issue of the relationship between existing rights and the rights provided by the Convention itself.⁷⁸ According to this provision, the possibility of reducing existing rights is not excluded. The CC, therefore, did not accept the argument of the communicant that the reduction of existing rights was in conflict with international human rights law and the principle of non-retrogression.⁷⁹

In the case about standing referred to in section 5.5 above, the Party made some points concerning its internal law and constitutional structure relating to its obligations

under international law to observe and comply with the Convention. The CC, therefore, stressed, “that its review of Parties’ compliance with the Convention is an exercise governed by international law”, and that, “as a matter of general international law of treaties, codified by Article 27 of the 1969 Vienna Convention on the Law of Treaties, a state may not invoke its internal law as justification for failure to perform a treaty”.⁸⁰

6. Concluding remarks

The experience of the CM of the Aarhus Convention so far demonstrates that it is possible to deal with compliance issues in an open and transparent manner. It seems to have been the right approach to set out in the “founding decision” of the MOP relatively few, and not very detailed, rules of procedure for the CC, leaving it to the CC itself to develop its procedures. This has enabled the CC to work out its procedures step by step and in a pragmatic manner building on its own experience. The fact that rules of procedure do not need any approval by the MOP⁸¹ provides more freedom of the CC to amend its procedures in light of experience gained.

Experience also shows that public involvement in the process does not cause any problems. The opportunity provided to the public to complain (communications) has been used, but not misused, and communications have usually been well prepared and well reasoned.⁸² Out of seventeen communications only four were found to be inadmissible.

Parties whose compliance has been at issue have cooperated, however, sometimes slowly or even extremely

slowly, not respecting the relevant deadlines set out in Decision I/7,⁸³ but none of the Parties have completely ignored the requests of the CC. Findings and recommendations of the CC in a case about standing of NGOs in Belgium immediately entailed a “Proposition de loi modifiant le code judiciaire en vue d’accorder aux associations le droit d’introduire une action d’intérêt collectif” to the “Chambre des Représentants” by two parliamentarians. The purpose of the proposal is explicitly to “donner suite aux recommandations du Comité d’examen du respect des dispositions de la Convention d’Aarhus”.⁸⁴

Parties have also accepted invitations of the CC⁸⁵ to discuss formally the merits of communications with the CC, not only in the presence of NGOs as observers but also with the participation of communicants in the discussion.

It is probably too early to fully assess the impact of the findings and recommendations (as adopted by the MOP) of the CC, but there are certainly, as pointed out, some indications that they might lead to improved compliance. In this regard, it is noteworthy that the first MOP (MOP-2)



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which was confronted by the findings and recommendations of the CC did not exercise any kind of censorship with regard to the findings. On the contrary, MOP-2 protected the integrity of CC by endorsing its findings in addition to welcoming the way it had been working and the procedures it had developed.⁸⁶ The MOP also accepted most of the recommendations of the CC relating to concrete cases by turning them into recommendations of the MOP to the Parties concerned. Also, the Parties whose compliance was the subject of findings and recommendations of the CC and who participated in MOP-2 accepted the decisions of MOP-2 in this regard, since the decisions of the MOP were made by consensus. Even a couple of relevant Parties who did not participate in MOP-2 later responded to the request of the CC concerning cooperation with a view of implementing the recommendations.⁸⁷

It still remains to be seen to what extent recommendations will be implemented in practice. However, there is nothing to indicate that the critical observations of the United States, *inter alia* about the efficacy of the CM and the role of NGOs, made at the occasion of the adoption of the CM at MOP-1, have any relevance.⁸⁸

Notes

1 United Nations Treaty Series (UNTS), vol. 2161, p. 447. The Convention text can be accessed on the Convention website: <http://www.unep.org/env/pp/>. On the Aarhus Convention in general as well as on human rights and the environment, see references in Veit Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)", in Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge University Press, 2007, at note 16.

2 ECE/MP.PP/7 rooted in the Aarhus Convention Articles 5, 9 and 10 (2)(i).
3 Decision II/1 on Genetically Modified Organisms, doc. ECE/MP.PP/2005/2/Add 2 Annex, amending Article 6 (11) and inserting a new Article 6 bis as well as a new Annex 1 bis to the Convention, re Elsa Tsoumani, "Aarhus Convention: Second Meeting of the Parties", in *Environmental Policy and Law* Vol. 35/4–5, 2005 p. 163.

4 Article 4.

5 Article 5.

6 Article 6 and Annex I.

7 Article 7.

8 Article 8.

9 Article 9.

10 Articles 10 (MOP) and 12 (Secretariat).

11 Article 14.

12 Article 16 and Annex II.

13 Articles 17–22.

14 Decision I/7, doc. ECE/MP.PP/2002/2 (Add.8) consisting of a decision with a few operative provisions while the annex to the decision contains the main body of provisions relating to the compliance mechanism (hereinafter Decision I/7). References in the paper to Decision I/7 are references to provisions of the annex. Specific references to relevant provisions of the annex are provided in the footnotes. The decision as a whole is referred to below as the compliance mechanism (CM), while the Compliance Committee is referred to as CC. On the negotiation history of Decision I/7, see Veit Koester (2005), "Review of Compliance under the Aarhus Convention: A Rather Unique Compliance Mechanism" in *Journal for European Environmental and Planning Law* (JEEPL) 2005, Vol. 2/1, p. 33.

15 Article 15, "Review of Compliance. The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."

16 See, generally, Koester (2006), *supra* note 1 and Koester (2005), *supra* note 14, *inter alia* with specific references to CMs of other MEAs; Ulrich Beyerlin, Peter-Tobias Stroll and Rüdiger Wolfrum (eds), "Ensuring Compliance with Multilateral Environmental Agreements: A dialogue between Practitioners and Academia", Martinus Nijhoff Publishers, 2006, *Making Treaties Work*, *supra* note 1, and Durwood Zaelke, Donald Kaniaru and Eva Kruziková (eds), *Making Law*

Work: Environmental Compliance and Sustainable Development, Vols 1 and 2, Cameron, May 2005, which also contains contributions on compliance theory. By referring to the unique features of the Aarhus Convention CM, I am only stating a fact. This does not imply that I agree with the usual argument that every CM has to be designed in order to meet the requirements of the specific instrument at hand. There are, in my opinion, no convincing arguments to justify that all CMs differ from each other. Almost all features characteristic of the Aarhus Convention CM could be applied to almost all other CMs. Only with regard to non-compliance response measures might there be valid reasons for some kind of differentiation, and it is also, to some extent, understandable that the CM of the Kyoto Protocol is of a rather specific nature. By and large, the explanation of the differences of the CMs of MEAs is embodied in human nature: the ambition of negotiators to leave their fingerprints.

17 The CC consists of eight members (by Decision II/5 ECE/MP.PP/2005/2/Add. 6, 13 June 2005, para. 12, increasing to nine members with effect from the third ordinary MOP) serving in a personal capacity (Decision I/7, Annex, para. 1). However, in Koester (2005), *supra* note 13, p. 33, I have argued that the negotiation history of Decision I/7 as well as the practice of Parties demonstrate that members should be independent, *i.e.*, not be part of or represent the executive branch of the government of a Party. Similarly, members of the CC who have been nominated by the NGO community cannot represent an executive branch of a NGO. The latest practice underscores these observations. In May 2006 a member of the Committee resigned because she had accepted a position in the Environmental Ministry of her country and was replaced by the Bureau of the MOP by an independent person; see Report on meeting of the working group of the Parties, doc. ECE/MP.PP/WG.1/2006/2, June 2006, para. 55: "...one of the members of the Compliance Committee, Ms. ..., had recently accepted a position in the ... Environment Ministry and, mindful of the fact that Committee members are required to serve in their personal capacity and should be independent, had given notice of her intention to stand down from the Committee".

18 As a consequence of Decision I/7, Annex, para. 18 the CC may not consider communications from members of the public during the first year after the entry into force of the Convention for a state Party. No Party has exercised its rights under para. 18 to opt out (for a period of not more than four years) of the provisions concerning communications from the public.

19 Decision I/7, Annex, paras 15–16 (submissions), para. 17 (referrals) and paras 19–24 (communications).

20 Decision I/7, Annex, sections VII–XI.

21 Report on first meeting, MP.PP/C.1/2003/2, April 2003.

22 Report on first meeting, *supra* note 21; Report on second meeting, MP.PP/C.1/2003/4, September 2003; Report on third meeting, MP.PP/C.1/2004/2, March 2004; Report on fourth meeting, MP.PP/C.1/2004/4, July 2004; report on fifth meeting, MP.PP/C.1/2004/6, October 2004; Report on sixth meeting, MP.PP/C.1/8, January 2005, Report on seventh meeting, ECE/MP.PP/C.1/2005/2, March 2005 with the following decisions by the CC issued as addenda to the meeting report: Addendum 1, Findings and recommendations with regard to compliance by Kazakhstan, communication ACCC/C/2004/01 by Green Salvation, Kazakhstan (referred to below as C/01, Kazatonpron); Addendum 2, Findings and recommendations with regard to compliance by Kazakhstan, communication ACCC/C/2004/02 by Green Salvation, Kazakhstan (referred to below as C/02, High-Voltage Power Line); Addendum 3, Findings and recommendations with regard to compliance by Ukraine, communication ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv, Ukraine (referred to below as S/01 and C/03, Danube Delta); Addendum 4, Findings and recommendations with regard to compliance by Hungary, communication ACCC/C/2004/04 by Clean Air Action Group, Hungary (referred to below as C/04, Expressway Network Act 1); and Addendum 5, Findings and recommendations with regard to compliance by Turkmenistan, communication ACCC/C/2004/05 by Biotica, Moldova (referred to below as C/05, Public Associations Act); Report on eighth meeting, ECE/MP.PP/C.1/2005/4, July 2005; Report on ninth meeting, ECE/MP.PP/C.1/2005/6, October 2005; Report on tenth meeting, ECE/MP.PP/C.1/2005/8, December 2005; Report on eleventh meeting, ECE/MP.PP/C.1/2006/2, May 2006 with Addendum 1, Findings and Recommendations with regard to compliance with Armenia, Communication ACCC/C/2004/08 by the Centre for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Centre and the Armenian Botanical Society, Armenia (referred to below as C/08, Dalma Orchards) and including, in paras 16 to 19 of the Report summary findings and recommendations regarding ACCC/C/13, communication by Clean Air Action Group, Hungary (referred to below as C/13, Expressway Network Act 2); and Report on twelfth meeting, ECE/MP.PP/C.1/2006/4, July 2006 with Addendum 1, Findings and Recommendations with regard to compliance by Kazakhstan, communication ACCC/C/2004/06 by Ms Gatina, Mr Gatin and Ms Konyushkova Kazakhstan (referred to below as C/06, Cement Storage Facility) and Addendum 2, Findings and Recommendations with regard to compliance by Belgium, communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaadered VZW, Belgium (hereinafter C/11, Standing before Belgian Judicature). All reports with addenda are available at the website; see note 24.

23 Section I of Report of the Compliance Committee, ECE/MP.PP/2005/13, March 2005 with addenda 1, 2, 3, 4 and 5. ➤

24 *Modus Operandi* of the CC (the title of the document is Guidance Document on the Aarhus Convention Compliance Mechanism), Meeting Reports as well as documents relating to communications and other specific files are available at the website of the CC: <http://www.unece.org/env/pp/compliance.htm>.

25 Decision II/5 on General Issues of Compliance, doc. ECE/MP.PP/2005/2/Add.6, para. 5. Other decisions of MOP-2 relating to compliance are: Decision II/5a on compliance by Kazakhstan with its obligations under the Aarhus Convention, doc. ECE/MP.PP/2005/2/Add.7; Decision II/5b on compliance by Ukraine with its obligations under the Aarhus Convention, doc. ECE/MP.PP/2005/2/Add.8; and Decision II/5c on compliance by Turkmenistan with its obligations under the Aarhus Convention, doc. ECE/MP.PP/2005/2/Add.9. All decisions referred to are dated 13 June 2005 and are available on the website of the Convention, *supra* note 1.

26 Unless a specific reference is provided all information below is contained in *Modus Operandi*, *supra* note 24.

27 See, generally, *Koester* (2005) and *Koester* (2006), *supra* notes 1 and 14.

28 Notwithstanding usual requirements of contacting the Secretariat of the Convention in advance in order to be able to enter the premises of UN/ECE in Geneva, where meetings of the CC are normally held.

29 Decision I/7. Annex, para. 32.

30 According to *Modus Operandi*.

31 Decision I/7. Annex, para. 24.

32 Report on tenth meeting, *supra* note 22, para. 25. The entitlement to comment on draft findings, Decision I/7, Annex, para. 34, belongs to the traditional procedural safeguards of CMs of MEAs.

33 *Modus Operandi*, *supra* note 24, section on Information gathering as amended by decision of the CC, Report on eighth meeting, *supra* note 22, para. 33 regarding academic literature.

34 *Modus Operandi*, *supra* note 24, section on Cooperation with the NGO community.

35 See, for a number of references to this subject, *Koester* (2006) at note 1. The fact that a number of other references are provided by Astrid Epiney, "The Role of NGOs in the Process of Ensuring Compliance with MEAs", note 1, p. 319, in *Ensuring Compliance with Multilateral Agreements* (2006), *supra* note 16, demonstrates the amount of academic debate on this issue. For another recent contribution to the debate, see Svitlana Kravchenko, "The Role of Civil Society", in Adrian J. Bradbrook (ed.), *The Law of Energy for Sustainable Development*, IUCN Academy of Environmental Law Studies, Cambridge University Press, 2005, pp. 521-539.

36 *Modus Operandi*, *supra* note 24, section on procedures for handling submissions and referrals.

37 Decision I/7. Annex, para. 29. The decision of the CC was applied in C/05 (Public Association Act), *supra* note 22.

38 Decision I/7. Annex, paras 36 and 37.

39 Decision I/7. Annex, paras 33 and 34 in conjunction with paras 36 and 37.

40 Decision I/7. Annex, para. 20.

41 See letter of 14 May 2006 from the Chair of the CC to Karel Blaha, Chairman of the Working Group on the PRTR Protocol, available at the website of the CC, *supra* note 24.

42 Decision I/7. Annex, para. 21.

43 Decision I/7. Annex, para. 36 (b).

44 Standard template-based procedural letters accompanying draft findings and conclusions being sent to the parties concerned for comments are normally not published on the website but are made available to the public upon request. The standard form used to "persuade" the party concerned to agree with recommendations is: "The Committee is particularly keen to receive your comments, including an indication of whether you agree with the proposed recommendations While it is aware that it has the possibility to reformulate its opinions as 'advice' within the meaning of paragraph 37 (a) of the annex to Decision I/7, it would prefer to reach agreement with your Government upon a set of recommendations aimed at making progress well in advance of the third meeting of the Parties. The Committee aims to work in a consensual and non-confrontational way. It hopes that through constructive dialogue, sufficient progress will have been made to obviate any need to refer the matter of non-compliance to the third meeting of the Parties. This would allow the Committee's report to the Meeting of the Parties to concentrate more on progress achieved than on outstanding problems." This form was used to the Parties concerned in e.g. C/06 (Cement Storage Facility) and C/08 (Dalma Orchards), *supra* note 22, letters of 16 December 2005. The powers of the CC are rather limited; see *Koester* (2006), *supra* note 1, at note 108. Irrespective of the practice developed by the CC concerning recommendations directly to Parties during the period between MOPs, the MOP may, of course, if it so wishes, overturn findings of the CC even when they are not presented to the MOP with a view of its endorsement.

45 References to decisions on such procedures are only provided to the extent that decisions are not included in the *Modus Operandi*.

46 See, as examples, *supra* note 22, C/02 (High-Voltage Power Line) para. 29: The CC "considers it to be beyond the scope of its mandate to examine the claim by the communicant ... that other regulations were breached through the construction of the power line"; C/06 (Cement Storage Facility) para. 25: "... it is not within the Committee's mandate to assess these alleged violations or verify the information", and para. 30 (b): "... the Committee is not in a position to interpret substantive

environmental and administrative legislation of the Party when it falls outside the Convention".

47 *Supra* note 22, C/04 (Expressway Network Act 1) para. 18 and *infra* note 53.

48 Report of the Compliance Committee to MOP 2, doc. ECE/MP.PP/2005/13, 13 March 2005, para. 16 relating to S/01 and C/03 (Danube Delta) para. 8 on an inquiry commission under the Espoo Convention aimed at determining whether the activity (construction of a navigation canal) was likely to have a significant transboundary environmental impact, and the decision of the Aarhus Convention CC to consider that aspect of the communication related to Article 6 (2) (e) in the light of the findings of the inquiry procedure when the findings are available (because the findings might provide useful guidance on the issue of alleged transboundary effects). The report of the Inquiry Commission was published in July 2006 (re UNECE press release ECE/ENV/06/P05 of 10 July 2006) concluding that the building of the canal is likely to have a number of significant adverse transboundary impacts; see <http://www.unece.org/env/eia/inquiry.htm>. The CC of the Aarhus Convention considered the implications of the outcome of the inquiry procedure in respect of compliance issues under the Aarhus Convention at its thirteenth meeting, ECE/MP.PP/C.1/2006/6, November 2006, paras 11-14. The CC noted that the findings of the Inquiry Commission raised a question of interpretation of the concept of being "subject to a transboundary environmental impact procedure" in Art. 6, para. 2 (e), i.e., whether the failure to include information in a notification that an activity was subject to a transboundary environmental impact procedure represented a breach of Art. 6, para. 2 (e), where such procedure was required, but was not undertaken. However, the CC considered that it was neither necessary nor constructive to attempt to resolve this question in the present context. Rather, the priority should be for Ukraine to ensure that the public concerned was notified of the forthcoming transboundary impact procedure required under the Espoo Convention. This priority should be taken into account in the strategy developed by Ukraine to fulfil the recommendations in Decision II/5 b (*supra* note 25) on compliance by Ukraine with its obligations under the Aarhus Convention. The strategy was discussed at the same meeting with a representative of the government of Ukraine who presented the draft elements of the strategy that was developed by Ukraine pursuant to Decision II/5 b. On the issue of "competing CMs", see *Koester* (2006) (*supra* note 1) at note 95. S/01 and C/03 (Danube Delta) is remarkable, because it includes, in addition to a communication, a party-to-party submission (Romania v. Ukraine). This submission is noteworthy for two reasons. First, the submission is complaining not only about the lack of proper involvement of Romanian citizens and NGOs in the decision-making process (concerning the construction of a navigation canal in the Ukrainian part of the Danube Delta), but also about the lack of public participation in Ukraine. Second, party-to-party submissions are extremely rare. Maybe the Danube Delta case is the only example, not only in respect of the Aarhus Convention CM, but also with respect to all other existing CMs. This pattern follows the pattern of formal MEA dispute settlement mechanisms, which have hardly ever been invoked in a party-to-party context. See, with regard to the only existing example, Jutta Brunnée, "Enforcement Mechanisms of International Law and International Environmental Law" in *Ensuring Compliance with Multilateral Environmental Agreements*, *supra* note 16, at note 62 (p. 14).

49 *Supra* note 22, C/02 (High-Voltage Power Line) para. 4: "... it [the Committee] took note of the ... reservations of the Party concerned but considered that significant events had taken place since the entry into force...". On the other hand in C/06 (Cement Storage Facility) para. 21 the CC notes "that some of the activities described in the communication took place prior to the Convention's entry into force for Kazakhstan", and that the Committee "will only address activities that took place after the entry into force of the Convention for Kazakhstan".

50 *Supra* note 22, C/11 (Standing before Belgian Judicature), para. 45. Of the eleven cases decided by various courts referred to by the communicant, none was initiated after the entry into force of the Convention for Belgium. Only two cases were finally dismissed after the entry into force of the Convention for Belgium, but even these cases were initiated before the entry into force of the Convention for Belgium (para. 20).

51 Cf. Article 28 of the Vienna Convention on the Law of Treaties.

52 Report on ninth meeting, *supra* note 22, para. 32. See also *infra* note 84.

53 Report on tenth meeting, *supra* note 22, paras 16-19 on C/13 (Expressway Network Act 2). See *supra* note 22 on the previous case (Expressway Network Act 1).

54 Decision I/7. Annex, para. 14.

55 *Supra* note 22; see, respectively, C/02 (High-Voltage Power Line) paras 26 and 27; S/01 and C/03 (Danube Delta) para. 28; C/05 (Public Associations Act) para. 19; C/11 (Standing before Belgian Judicature) para. 45; C/04 (Expressway Network Act 1) para. 14; C/06 (Cement Storage Facility) para. 28; and C/08 (Dalma Orchards) para. 32.

56 *Supra*, note 54.

57 Report on eleventh meeting, *supra* note 22, paras 18-22.

58 Report on twelfth meeting, *supra* note 22, paras 16-19 regarding ACCC/C/15, communication by Alburnus Maior, Romania. The meeting report, however, also reflects that some members had concerns about the issue of admissibility and some other members about the level of public participation. See also report on thirteenth meeting, *supra* note 48, at para. 21.

59 Excluding C/13 (Expressway Network 2), *supra* note 22.

60 *Supra* notes 22 and 25, Decision II/5a concerning C/01 (Kazatopron) and C/02 (High-Voltage Power Line), Decision II/5b concerning S/01 and C/03 (Danube Delta), and Decision II/5c concerning C/05 (Public Associations Act), and *Tsioumani* (2005), *supra* note 3, p. 164.

61 *Supra* notes 22 and 25, Decision II/5, para. 4 concerning C/04 (Expressway Network 1).

62 S/01 and C/03 (Danube Delta), *supra* note 22, para. 28.

63 Report of the Compliance Committee, *supra* note 23, para. 40.

64 C/02 (High-Voltage Power Line), *supra* note 22, para. 30.

65 Report of the Compliance Committee, *supra* note 23, para. 41.

66 C/13 (Expressway Network Act 2), *supra* note 22, was also concluded by the CC after MOP-2. However, this case is not included in the overview due to the manner in which it was resolved; re section 4.5. above.

67 S/01 and C/03 (Danube Delta), *supra* note 22, para. 26.

68 C/05 (Public Associations Act), *supra* note 22, paras 16 and 20. On C/05, see also *infra* note 87.

69 C/11 (Standing before Belgian Judicature), *supra* note 22. The communicant alleged that different criteria for standing with respect to procedures for seeking annulment and suspension, respectively, of decisions before the Belgian Council of State violated Article 3 (1). The CC restricted itself to state, without, however, having made any in-depth analysis, that the provisions of Article 9 (2) and 9 (3) of the Convention (on access to justice in respect of acts or omissions subject to the provisions of Article 6 and acts or omissions contravening provisions of national environmental law, respectively) do not require a single set of criteria for standing (re C/11, paras 42 and 43). Probably the CC did not find it necessary, at this stage, to address the issue related to Article 3 (1). See also section 5.5 below of this article.

70 *Supra* note 22: C/01 (Kzatonpron) paras 22 and 23; C/02 (High-Voltage Power Line) para. 27; S/01 and C/03 (Danube Delta) para. 34; and C/05 (Public Associations Act) para. 27, respectively.

71 Report of the Compliance Committee, *supra* note 23, paras 36–38.

72 See also Stephen Stec, "Aarhus Environmental Rights in Eastern Europe", in *The Yearbook of European Environmental Law*, Vol. 5, Oxford University Press, 2005, pp. 1–22.

73 *Supra* note 22: C/02 (High-Voltage Power Line) para. 30 and section 5.1 above at note 64; S/01 and C/03 (Danube Delta) para. 32; C/04 (Expressway Network Act 1) paras 11 and 12; C/08 (Dalma Orchards) paras 30 and 31, respectively.

74 Article 9 (3): "In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities, which contravene provisions of its national law relating to the environment."

75 *Supra* note 22. C/04 (Expressway Network Act 1) para. 13; C/06 (Cement Storage Facility) paras 28, 29, 30 (b) and 24; C/08 (Dalma Orchards) para. 38; and C/11 (Standing before Belgian Judicature) paras 28, 33, 34, 35, 38 and 41, respectively.

76 Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM (2003) 624 final. The proposal for a Regulation of the European Parliament of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final was, however, adopted at the beginning of July 2006; see Regulation (EC) No. 1367/2006 of 6 September 2006. On EC legislation on access to environmental information and on public participation, see Directives 2003/4/EC of 28 January 2003 and 2003/35/EC of 26 May 2003 respectively. The last-mentioned directive also relates to access to justice in connection with public participation. See furthermore Cornelia Ziehm, "Legal Standing for NGOs in Environmental Matters under the Aarhus Convention and under Community and National Law", in *Journal of European Environmental and Planning Legislation* No. 4/2005, pp. 287–300, as well as Jerzy Jendróška, "Public Information and Participation in EC Environmental Law: Origins, Milestones and Trends", in *Reflections on 30 Years of EU Environmental Law: A High Level of Protection*, Europa Law Publishing, Groningen, 2005, pp. 62–86, and "Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention Requirements in EC Law", in Thomas Ormond, Martin Führ and Regine Barth (eds), *Environmental Law and Policy at the Turn of the 21st Century*, Lexxion, Berlin, 2006, pp. 37–50.

77 Report of the Compliance Committee, *supra* note 23, para. 43 and Decision II/5 by the MOP, *supra* note 25, para. 9.

78 Article 3 (6): "This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters." Based upon its considerations of C/04 (Expressway Network Act 1) the CC made a general recommendation to MOP-2 in its report (*supra* note 23), para. 39 to the effect that derogations from existing rights decreasing those rights would generally not be in line with either the objective or

the spirit of the Convention, and that Parties, therefore, should be urged to refrain from reducing existing rights. The recommendation was, however, not addressed by MOP-2 (see also section 5.1 above on some other recommendations on general issues of compliance that were not addressed by MOP-2).

79 C/04 (Expressway Network Act 1) *supra* note 22, para. 18, note 4. The CC, however, also stated that existing rights cannot be reduced to the extent that they fall beyond the level granted by the Convention, but the CC found that the act at issue did not reduce the rights beyond that level.

80 C/11 (Standing before Belgian Judicature), *supra* note 22, para. 40.

81 CMs of other MEAs also leave it to the CC to elaborate its rules of procedures but frequently demand that such rules be approved by the governing body of the MEA, e.g., the CM of the Cartagena Biosafety Protocol, Decision BS-1/7 of the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety on establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety, Annex, I, para. 7.

82 See letter of 14 May 2006, *supra* note 41.

83 Based upon a recommendation of the CC in its report to MOP-2, *supra* note 23, MOP-2 included in its Decision II/5 on general issues of compliance, *supra* note 25, para. 8, a provision urging "all Parties to respect the agreed process and observe [the] deadlines in the future".

84 CC 11 (Standing before Belgian Judicature), *supra* note 22, referred to in section 5.5 of this article. The proposal was in fact submitted on the basis of draft findings and recommendations of the CC (April 2006) which were finalised at the CC's twelfth meeting in June 2006. The proposal to the *Chambre des Représentants* is of 11 July 2006 (Doc. 51 2620/001). The Federal Environmental Minister responded positively to the recommendations of the CC indicating a number of measures being taken to address the matter; see *UNECE Weekly*, Issue No. 179/3–7 July 2006.

85 Funds are provided by the trust fund of the Convention to cover travel costs and *per diems* of those communicants and Parties eligible to be funded.

86 With regard to C/04 (Expressway Network Act 1), *supra* note 22, MOP-2 (only) took note of the conclusions, in particular, that Hungary was in compliance with its obligations, re Decision II/5, *supra* note 23, para. 3. See, regarding the endorsements, Decisions II/5a, II/5b and II/5c, *supra* note 23, and regarding the welcoming of the procedures of the CC, see section 3.1 above.

87 Of the Parties whose compliance was the subject of findings and recommendations of the CC only Hungary and Kazakhstan (*supra* note 22) participated in MOP-2, while Turkmenistan and Ukraine (*supra* note 22) were absent. However, after MOP-2, Turkmenistan objected to the decision of the CC endorsed by MOP-2. The CC informed Turkmenistan that the CC was not entitled to change or renegotiate a decision endorsed by the MOP (see section 4.3 above, at note 52), and that it did not consider that it would have altered its main conclusions even if the information and arguments now provided by Turkmenistan had been available before the CC had made its decision. Nevertheless, the CC was ready to enter into a dialogue about the substantive issues within the framework of the recommendations of the MOP. Turkmenistan declared its willingness to cooperate, which resulted in an invitation by the CC to Turkmenistan to attend the twelfth meeting of the CC to discuss measures for implementation of the recommendations of MOP. The discussion was, in the opinion of the CC, constructive. However, in a letter to the CC after the meeting Turkmenistan returned to its previous objections, and thereby appeared to exclude the possibility of a dialogue on the recommendations of the MOP. The CC, therefore, decided not to pursue further discussions with Turkmenistan and informed Turkmenistan that it would reflect on the process in its next report. The CC also reserved its right to recommend to the MOP any of the non-compliance measures foreseen in Decision I/7 (*supra* note 14), including issuance of a caution or suspension of specific rights (Report on ninth meeting, *supra* note 22, paras 31 and 32; Report on eleventh meeting, *supra* note 22, para. 31; Report on twelfth meeting, *supra* note 22, paras 28–31; and Report on thirteenth meeting, *supra* note 48, para. 30, with letter of 17 October 2006 from the chairperson of the CC to Minister Akmuradov, Ministry of Nature Protection, Turkmenistan). The CC has managed to enter into dialogue with Ukraine (Report on eleventh meeting, *supra* note 22, para. 30, Report on twelfth meeting, *supra* note 22, para. 26, and Report on thirteenth meeting, *supra* note 48, paras 27–30).

88 The observations of the US are contained in a formal statement; see Report on the First Meeting of the Parties, doc. ECE/MP.PP/2, 17 December 2002, para. 45 and Annex to the report. The statement, concluding that the US will not recognise the CM as a precedent, is also printed in *Environmental Policy and Law*, Vol. 33/3–4, 2003, p. 178. The EU stated in its response to the statement that the CM is fully compatible with international law. The US Statement notes (para. 8) the "unfortunate situation where a non-governmental organisation might be afforded a greater status ... For example, in cases where the Committee is reviewing a submission by a member of the public it appears that a member of the public would be entitled to participate in the Committee's review while another Party would not be so entitled". This part of the statement ignores completely that all Parties have their say as members of the MOP which is the final decision-making body, while members of the public, even those who are communicants, have only (as a maximum) observer status at MOPs. The statement also criticises some of the non-compliance response measures, e.g., "declarations of non-compliance" and issuance of "cau-

tions" (Decision I/7, para. 37 (e) and (f)), the consistency of which with the enabling provision (Art. 15) is being questioned. Reference is made to the nature of the CM calling for non-confrontational, non-judicial and consultative arrangements (Statement para. 10). This part of the Statement overlooks completely that some comparable CMs include the very same non-compliance response measures (see *Koester* (2005), *supra* note 14, at note 59). Furthermore, the Statement (para. 11)

raises "serious questions" about the legal basis for the measure related to suspension of rights and privileges (Decision I/7, para. 37 (g)). This part of the Statement, however, seems to ignore the fact that the CM of the Montreal Protocol to which the US is a Party contains a comparable measure (see *Koester* (2006), *supra* note 1, at section 7.5). In addition, the Statement does not, in the opinion of the present author, interpret the relevant provision of Decision I/7 correctly; see *Koester* (2006), *ibid.*

Discussion of Cluster 2: Compliance

Alex Kiss, referring to Patrick Széll's presentation, said that international jurisdiction in environmental matters was not easy, which could arise from the problem of scientific expertise. In a specific case he could see how judges could be troubled by the scientific aspects of the problem when, of course, each party had its own scientific experts and judges had to make their decision between those, which was not easy.

Another point was that there were frequently – in the supervising of compliance procedures – reporting systems which had come from the Human Rights treaties, which originally started with this system and then increasingly more international environmental agreements had incorporated them into the treaty. The system functioned, but not always very well. He had asked himself why it did not function in all of the cases and had come to the conclusion that the reporting system was not a simple one – especially for small States and developing countries. That is to say, they must have experts on all the problems and they did not always have them. So he came to the personal conclusion that perhaps the best thing would be to centralise the multilateral environmental agreements (MEAs) and to ask them to prepare a general statement on this. It was understood that, in particular cases of different MEAs, some precise details could be given, which would include that there should be a central organism, such as UNEP, to receive the country reports and then the different organs could ask for details on the basis of the general country report. This would be with the understanding that developing countries and smaller States could request the help of experts in preparing the reports.

Henri Smets explained that within the Organisation for Economic Cooperation and Development (OECD) with its now larger number of States, every year four or five countries were reviewed with regard to their environmental performance. The procedure is as follows. A country presents a report, which is used as a basis for information and is reviewed by a team of usually five to ten people, made up of independent experts, originating in Member countries and from the OECD Secretariat. The procedure is carried out totally behind closed doors but as everything is published later, there is transparency. It is important that the meetings are held behind closed doors without anyone present except the Member State representatives, the secretariat and the State focused on, which is usually represented at a very high level. Many ministries are present at the same time, because a State is being reviewed on all aspects and integration is very important. It is more policy review than legal review but it incorporates a lot of legal aspects.

Henri Smets felt that this was being carried out with some measure of success, in that it was being done seriously, followed by conclusions and good advice which were not without use.

There is then a second "review" round four or five years later he said, at which the States are informed whether or not they have followed the advice given during the first review, and if not, why not. All this is published. At the third round, the conclusions of the first two reviews are put on the table and the States are again informed of what they have not done. Some of the recommendations may be no good at all. They represent the OECD *leitmotiv* with a certain type of economic instruments. However, there is an ongoing skirmish between the economic directorate, whose views are ultra-liberal, and the views of the environment directorate, which are more balanced with social considerations.

He said that the system has operated so well that it is now being used on non-OECD States. For example, Russia, China and Chile had all been reviewed at their own request. This will go further, and the system is being transferred as a mechanism for review on the environment to other international organisations such as the United Nations Economic Commission for Europe (UN/ECE) in Geneva and the Economic Commission for Latin America and the Caribbean (ECLAC). They are using the system and learning how to use the procedures and adapt them for their own. So it might be that Brazil, for instance, among the candidates for review, could be reviewed by OECD or by ECLAC.

The speaker had the opportunity to be on the review team for about 29 countries, where he was mostly concerned with issues of economics or international environmental law. Veit Koester confirmed that when his country (Denmark) was reviewed by OECD, there was a huge delegation.

Johan Lammers asked Henri Smets why an OECD team would review the activities of Brazil and China, non-OECD members. Henri Smets replied that it was at the request of the country in question. For example, when Russia wanted to improve its international image, he said, it could have asked the UN/ECE. But it specifically requested the OECD to review Russian policy, which for the OECD was completely new, although it should be noted that OECD did carry out a lot of non-OECD work in the environment directorate.

Eckard Reh binder asked Patrick Széll how he assessed the potential of third-party litigation based on the alleged violation of international agreements and noted that in some countries it is quite common to invoke the violation of international agreements.

Bo Kjellén said his question to Patrick Széll was linked to compliance procedures in general and in particular to what